

Service Date: January 5, 2005

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF WWC HOLDING CO.,)	UTILITY DIVISION
Application for Designation as an Eligible)	
Telecommunications Carrier in Montana)	DOCKET NO. D2003.1.14
Areas Served by Qwest Corporation)	ORDER NO. 6492b

ORDER ON RECONSIDERATION

A. Introduction

WWC Holding Co. (Western Wireless, Western, or WW), applicant in the above-entitled matter, has moved for reconsideration of the Public Service Commission's (Commission or PSC) October 22, 2004, order (*PSC Order No. 6492a*) granting WW status as an eligible telecommunications carrier (ETC), with conditions. WW's status as an ETC applies in most of the Montana non-rural service areas of Qwest Communications, Inc. The Montana Consumer Counsel (MCC), intervenor in WW's application, has also moved for reconsideration. Other intervenors, Montana Independent Telecommunications Systems (MITS) and Montana Telephone Association (MTA), have submitted arguments related to reconsideration by WW and MCC.

On reconsideration WW requests an ETC designation without conditions. MCC requests the additional condition of WW fund-receipt limited to new and captured lines. The PSC affirms PSC Order No. 6492a for the reasons, and with clarifications, discussed below. Absent the conditions included in PSC Order No. 6492a the PSC cannot conclude that WW's application is in the public interest, factually or legally, as WW's application and related case-in-chief does not otherwise clearly demonstrate a public interest. The PSC determines the Federal Communications Commission (FCC), not the PSC, is the proper authority to resolve MCC's new and captured line argument.

B. Western Wireless Motion for Reconsideration

1. WW Argument 1 -- General

a. Argument

WW urges the PSC to reconsider and reject all of the "*ad hoc*" requirements (conditions) that affect WW. At a minimum, WW seeks clarification of what WW argues are inconsistencies and ambiguities in the PSC order.

b. Intervenor Responses

MITS' response is an outright refutation of WW's assertion that no party to this docket disputed WW's satisfaction of the basic requirements contained in § 214(e)(1), the FCC rules, and §69-3-840 MCA. To the contrary, MITS cites to instances in the MITS and in MTA post-hearing briefs that dispute WW's assertion.

c. PSC Determination

WW is confused regarding what comprises the basic criteria that a petitioning ETC must satisfy. WW appears to satisfy the nine supported services as required by § 214(e)(1), but that section references the public interest requirement of § 214(e)(2), which allows the PSC to consider and perform a public interest analysis in any ETC designation. WW must comply with the PSC's public interest requirements identified in the order. So long as WW does not satisfy the public interest requirements WW will not be certified as an ETC as WW has not satisfied § 214(e)(2). And because WW has not satisfied § 214(e)(2), WW cannot have satisfied § 214(e)(1). Since § 69-3-840, MCA, is anchored to § 214(e)(1), the PSC's determinations regarding the public interest requirements leads in a logical trail directly to a conclusion that, absent the conditions, WW fails to satisfy § 69-3-840, MCA. To the extent the PSC determines clarification is necessary regarding PSC Order No. 6492a, the PSC will do so in this order.

2. Western Argument 2 -- PSC Authority, Formal Rulemaking Process

a. Argument

WW's motion asserts that the PSC should reconsider and delete the conditions of WW's designation as an ETC, as the PSC has exceeded its authority, in that the PSC can only take action consistent with its statutory authority established by §69-3-840, MCA, and § 214(e)(1). WW adds that because the PSC has acknowledged WW's satisfaction of § 214(e)(1), the PSC must designate WW as an ETC without further conditions or requirements.

WW further argues that even if the PSC is allowed to consider additional ETC conditions, the "*ad hoc*" requirements that the PSC imposed on WW are: 1) fatally flawed; 2) contrary to the PSC's rulemaking authority; and 3) unlawful and discriminatory. WW cites to three occasions when the Montana Supreme Court has reversed Montana state agencies for taking actions allegedly similar to those imposed by the PSC. Based on this case law, WW holds it is clear that the PSC implemented an unlawful rulemaking in this docket by establishing conditions in the order. WW suggests because the PSC's ETC conditions amount to rules, the protections of the Montana Administrative Procedures Act (MAPA) are triggered automatically. Because the PSC imposed rules on WW that were not adopted pursuant to lawful rulemaking authority they are invalid.

WW holds that the PSC's reliance on *TOPUC v. FCC* as authority to impose additional ETC requirements is without support, as *TOPUC* did not eviscerate the PSC's obligation to implement a rulemaking proceeding in these circumstances. WW also holds that *TOPUC* does not allow the PSC to unilaterally create "*ad hoc*" conditions to a federal ETC designation. Nothing in *TOPUC* addressed wireless carriers who have historically operated outside the regulatory jurisdiction of a state commission. Because the PSC's new requirements affected an unlawful rulemaking the PSC should reconsider its order and reject the "*ad hoc*" provisions.

WW also maintains that the PSC's ETC requirements unlawfully discriminate by only imposing on WW still pending rulemaking decisions. By its statement "[t]he very fact that the rulemaking proceeding is pending should preclude the imposition of what at this point can only be speculative conditions" WW appears to believe that the PSC's rules apply to WW prior to

finalization and adoption. WW asserts later that the PSC imposes these new ETC requirements on WW alone and therefore they are discriminatory and unlawful. WW also holds that a formal rulemaking applies as the PSC has purportedly declared Montana policy.

WW maintains that the PSC is statutorily limited to applying 47 U.S.C. §214 adding that there is no authority in either “the Act” or Montana law that allows the PSC to apply § 254 selectively as MITS has proposed.

b. Intervenor Responses

MTA, MITS, and MCC filed responses on this issue. MTA recommends that the PSC should either deny WW’s motion for reconsideration or hold in abeyance its grant of ETC status to WW until conclusion of the PSC rulemaking proceeding establishing rules that govern the designation of ETCs. MTA supports many of the requirements in the order. As for the authority, MTA cites to the FCC’s *Virginia Cellular* decision adding that other FCC decisions reference *TOPUC*. MTA asserts, based upon these decisions that the PSC has an obligation to consider the public interest and impose requirements in ETC designations to protect the public interest. MTA adds that because WW objects to the imposition of any requirements not imposed on other competitive eligible telecommunications carriers (CETCs) the PSC can defer its designation of WW as an ETC until the rulemaking concludes.

MITS cites to the principles contained in § 254, ones MITS argues WW has chosen to ignore. MITS maintains that WW ignores significant rulings that clarify the role of state commissions in ETC designation proceedings, adding that the PSC’s actions in the WW order fall well within the PSC’s statutory authority. MITS also responds to WW’s arguments that the PSC imposed new rules without conducting a formal rulemaking and that the process was not conducted in accordance with MAPA. MITS explains that it is not unusual for the PSC to impose compliance requirements in contested case proceedings and adds that the PSC neither intended nor did it impose new rules in this proceeding.

In regard to the ETC designation and certification requirements, MITS asks the PSC to clarify its finding that “...those rules will largely guide the decision making process involving both past and prospective ETC designations and annual certifications” (*Order 6492a*, p. 22).

MITS expresses puzzlement over WW’s changed positions and observes that WW objected to the PSC’s ETC contested case proceeding because a rulemaking should be used. Earlier WW objected to the rulemaking proceeding and to a proposed suspension of pending ETC petitions. More recently, WW sought to delay the rulemaking.

MITS also comments that the PSC’s role is to ensure that its ETC designations are consistent with the public interest. Therefore, the PSC may reconsider prior ETC designations based upon new requirements. MITS also explains that the PSC’s additional ETC requirements do not unlawfully discriminate against WW. MITS adds whether the PSC ever adopts rules is immaterial to the fact that the PSC reached its decisions in this contested case proceeding based on record evidence, rules of procedure, and MAPA.

MCC asks that the PSC deny WW’s motion for reconsideration and grant the MCC’s motion instead. MCC notes its disagreement with WW over the PSC’s authority to impose conditions when considering ETC designations. While it may have preferred that a rulemaking occur first, taking up ETC applications such as WW’s is necessary to protect the public interest. As for WW’s recent motion for continuance of the ETC rulemaking the MCC adds that the PSC has the duty to issue orders that are in the public interest and not solely in WW’s interest. As for WW’s discrimination concern, the MCC holds that any perceived discrimination is avoided if WW agrees to forego receipt of universal service funds until all ETCs are on equal footing.

c. PSC Determination

The PSC statement regarding rules largely guiding the ETC decision making process, means that orders may contain requirements not in the rules and may relieve requirements in the rules. The rules fully contemplate case-by-case contested case proceedings. The reference to past and prospective ETC designations means that whereas the Commission has previously

approved ETC designations for the incumbent LECs (ILECs) in Montana, those approvals were not conditioned to the extent included in the WW order. The ILECs and WW will be treated the same, once the ETC rules are adopted. There is no grandfathering of any ETC approval. Previously designated ETCs will have to comply, as will WW, with the PSC's ETC rules.

The Commission disagrees with WW's argument that the Commission's decision is unlawfully discriminatory. Whereas WW is correct that this is the first time the Commission has imposed such requirements, prior ETC cases did not include the issues that parties have raised in this docket. The WW application is contested with detailed arguments. The PSC must consider and address the intervenors' arguments. It is noteworthy also that WW is the first wireless carrier to seek ETC designation in Qwest's service territory as the prior designations were for wire line CETCs. Wire line CETCs will not likely raise all similar issues as raised by the consideration of wireless carriers seeking ETC designation. The PSC will remain technologically neutral, but cannot ignore significant issues such as wireless supplementing existing wire line service, not supplanting existing wire line service. In addition WW must realize that, to the extent it competes with Qwest in the areas WW has applied for designation, it is competing with a fully regulated carrier that is subject to rate review and existing service quality standards, and will be subject to the PSC ETC rules when adopted. The PSC will apply its ETC rules to previously designated ILEC ETCs and competitive ETCs alike. Thus, once the rules are complete the PSC will require all designated ETCs to establish compliance. If an ETC cannot or will not establish compliance with the PSC ETC rules, the ETC's status as an ETC will be in jeopardy.

The Commission will not restate here the basis of its authority, which is contained in the WW order, except to note the following. The 5th Circuit Court of Appeals vacated an FCC rule prohibiting the states from imposing additional eligibility criteria for ETC status. The Court stated: "Therefore, we reverse that portion of the Order prohibiting states from imposing any additional requirements when designating carriers as eligible for federal universal service support." *Texas PUC v. FCC*, 183 F.3d 393 (5th Cir., 1999). The PSC again finds support in the above authority as it does in the FCC's recent *Virginia Cellular* decision. Both decisions make

clear the authority that a state commission has under § 214 to impose additional requirements that serve to promote the public interest. That is what the PSC has done in this case.

On the relevance of § 254 of the 1996 Act, the PSC finds that to the extent such principles are relevant to the public interest, which is a state commission consideration, then the § 254 principles can be considered.

3. Western Argument 3 -- Coverage Obligations

a. Argument

WW characterizes the PSC's coverage requirements as unlawful and ambiguous and asks that they be reconsidered. WW's motion distinguishes four separate arguments: 1) geographic coverage is an improper governing standard; 2) the coverage obligation condition is contrary to governing federal ETC standards; 3) the cream skimming concern is misplaced; and 4) the coverage obligation condition is internally inconsistent.

WW first argues that because the coverage condition is improperly based on geography instead of customers, that it should be eliminated. WW states that the PSC confused the obligation to serve geographic areas with the obligation to serve customers adding that neither the FCC nor federal law requires geographic coverage. The FCC has stated: "a new entrant, once designated an ETC, is required, as the incumbent is required, to extend its network to serve all customers upon reasonable request." WW cites the *Highland Cellular* case in which the FCC relied on the wireless carrier's commitment to serve customer requests, not the carrier's ability to blanket the area with radio signals. WW adds that the FCC's *Virginia Cellular* petition rejects the 100% geographic coverage in the context of service area requirements. Instead, the FCC's finding regards the obligation of a carrier to demonstrate that it can provide ubiquitous service "at the time of its request for designation as an ETC" (emphasis added). The FCC found that a carrier must improve its network and that its rules "acknowledge the existence of dead spots." WW concludes this first argument by stating that the proper inquiry is of whether WW has

demonstrated its commitment and ability to serve customers and not just to propagate signals to 98% or more of Qwest's "service area."

WW's second argument regarding this issue has three parts. In the first part, WW restates the FCC policy that an ETC applicant must be allowed the same reasonable opportunity to develop its network as is afforded the ILEC and, once designated, the applicant ETC is only obligated to extend its network to serve new customers upon reasonable request. The means by which WW would meet "this standard" include: antenna redirection, a high-gain antenna at the customer's home, by adjusting network facilities and new cell sites or extenders.¹ WW adds that no party challenged WW's legal authority, ability or commitment to provide the supported services in "Qwest service areas" and the Commission's more stringent 98% geographic coverage requirement is without an evidentiary basis, is unfounded, and is preempted by federal standards. WW argues there simply is no requirement that WW "prove that it can provide ubiquitous service throughout its requested service areas prior to designation" (emphasis added).

The second and third parts of WW's argument hold that the Commission's coverage condition is patently discriminatory, contrary to governing standards, and without record support. As for the Commission's requirement that WW must, by means of its own resources, serve all reasonable requests for service, WW responds that it would be severely handicapped if it were prohibited from sharing some of the costs with its customers. Qwest, for example, may furnish service within its own areas by including "the potential for construction zone connection, facility or temporary development charges imposed on a customer." WW also argues that the Commission's requirement to file coverage maps every 90 days until it achieves 100% coverage should be rejected as it is contrary to legal standards and is unduly burdensome. In its November 30, 2004, reply to response briefs, WW maintains that MITS incorrectly believes that the Commission can require WW to demonstrate its ability to serve at least 98% of Qwest's

¹ Although not mentioned here, in its testimony WW also mentions its "Tellular" wireless access unit and wireless local loop service (WLLS). (Order No. 6492a)

customers in each wire center, adding that there is no support whatsoever to require an ETC to demonstrate its ability to serve a competitor's customers. WW holds that the proper inquiry is whether WW has demonstrated its commitment and ability to serve customers and not simply to propagate signals to 98 percent or more of Qwest's customers.

b. Intervenor Responses

MTA asserts that the requirement that WW expand service to 98% of its "coverage area" within one year of its receipt of funds is necessary to ensure that WW properly uses Federal Universal Service Funds (federal USFs) to expand beyond the existing WW 85% coverage ability.

MITS observes that WW has confused the PSC's requirement to serve customers within a designated area with geographic signal coverage. Because Qwest is required to serve 100% of its customers in a geographic area, MITS is "dumfounded" by WW's challenge of the order, as the order only requires 98% coverage. MITS suggests that the PSC reconsider, and impose a 100% requirement on WW. As for WW's cite to a South Dakota pre-emption order, wherein the FCC addressed the ability of an ETC to provide ubiquitous service at the time of its request, MITS comments that the PSC's requirement differs and the PSC is well within its authority to impose the requirements it imposed.

c. PSC Determination

WW has identified the specific Qwest wire centers for which it both seeks and does not seek ETC designation (*late filed exhibits 6 and 7*). WW proposed as a threshold criterion for seeking ETC designation its ability to offer service to at least 85 percent of a wire center's population.² The PSC order required WW to improve upon this minimal 85% coverage

² WW asserts to need universal service funds (USF) to build out its network. WW adds that it will extend its network to serve "new customers upon reasonable request." (Initial Brief, p. 16; TR 48, 50) WW would not commit to expanding service to communities for which it has not petitioned for ETC designation. (TR 96-96) WW asserts that it will use universal service fund receipts to expand its network to serve the remaining yet-to-be served 15 percent. (TR 283)

capability.³ For each Qwest wire center (base rate and abutting zonal areas) the PSC required WW to achieve the capability to serve 98% of Qwest's customers.⁴ The order states that until the PSC's rules address the time allowed for designated ETC's to achieve the capability to serve 98% of Qwest's customers in each wire center, WW is allowed one year from the time it begins receiving federal USF, pursuant to this order, to complete its network upgrades and document its ability to offer services to 98% of each wire center's customer base.

Although the PSC order did not require WW to initially provide coverage to 98% of Qwest's Montana study area the PSC questions WW's unwillingness to do so as reflecting upon an apparent self interest in serving lucrative wire centers (cream skimming, WW's minimal coverage of 85% of wire centers also appears a case of cream skimming). It also reflects upon WW's inability, as a wireless technology carrier, to assume the obligations that Qwest assumes and fulfills. The PSC expressed concern given the dynamics of telecommunications markets and the yet-to-be scrutinized financial resources and commitment of carriers that have or that seek ETC status.

The PSC required WW to file status reports at six month intervals that explain WW's progress in serving the entire population of each wire center for which it is designated an ETC. These reports must provide the capital budget for prospective build out plans and describe the

³ Because WW chose the wire centers for which it seeks ETC designation based upon its ability to serve 85% or more of a wire center's population, it was asked to provide wire center maps that used to determine whether it met the 85% threshold. WW responded that no wire center level maps exist. (TR 141) WW adds that it superimposes data of its coverage on wire center boundaries and the population in its analysis, what it labels geocoding. (TR 142, 143, 151) The wire centers for which WW is designated an ETC include all "zone" areas outside the base rate area. (TR 280) If, a customer cannot receive WW's service (signal) despite the fact that it is located within a wire center (e.g., the other 15%) WW asserts that the customer can always get wireless local loop service. (TR 288)

⁴ The MCC's first criteria requires an ETC to certify its commitment to provide to any requesting "customer's location within the designated service area the defined services."

build out that WW actually has achieved (deployed) in the prior six months. Failure to provide these reports or to achieve the goal of serving 98% of each wire center's population, for which WW is designated an ETC, may result in measures taken to de-certify WW as an ETC.

The PSC order notes WW's explanation of how it may expand its coverage and enhance service quality. One option includes use of WW's Tellular, wireless access, unit (*TR 252-253*). Alternatives included adding towers and enhancements to the transmission capability of existing towers.

The PSC determined that WW must, by means of its own resources, serve all reasonable requests for wireless service at residences and businesses in each wire center. WW may choose the means by which it fulfills this obligation but it shall be, in the first instance, WW's responsibility and not that of its customers to provide coverage of each wire center at the minimal -104dBm (decibels per milliWatt) service standard.

The PSC ordered WW to provide maps of its actual signal coverage capability. WW must provide such information beginning 30 days after the issuance of the order in this docket and at 90 day intervals thereafter until it achieves 100% coverage. On each wire center map, WW must, based upon the -dBm standard, overlay maps of its coverage capability.

WW's motion for reconsideration characterizes the PSC order as requiring geographic coverage. Consistent with WW's petition, the starting point is each wire center for which WW seeks to be designated an ETC and which are well defined geographic areas. The order requires WW to achieve 98% coverage of each wire center's population within one year's time.⁵ Although WW's argument on this point is puzzling, it appears directed at the PSC's required 98% population coverage in each wire center. Thus, WW's motion is logically and fundamentally inconsistent with WW's own direct testimony. It was WW who first proposed a population

⁵ All but one of the Commission's findings correctly notes WW's coverage obligation as 98% of a wire center's population. The single reference to 100% was a typographical error and should also be 98% (see p. 25, under the heading Coverage Obligation).

coverage per wire center metric (*Order 6492a*, p. 7).⁶ WW chose wire centers as the relevant geographic area and then only seeks ETC designation if it can achieve 85% coverage of the population in each wire center. While the PSC has not changed the metric that WW initially proposed (population coverage per wire center) it has specified a higher standard as an eventual goal that WW must minimally achieve by the first anniversary of its designation as an ETC.

In addition, WW's own witness (Blundell) testified that the PSC has § 214(e)(2) authority to establish universal service areas and that service area is a geographic area established by a state commission. In the case of Qwest, the service area is the wire center. Thus, it is abundantly clear that the PSC has not chosen a different metric than WW proposed. The PSC has only used a higher standard, not a different metric.

As for WW's apparent interpretation that the PSC order requires WW to "prove that it can provide ubiquitous service throughout its requested service areas prior to designation" WW again appears confused. The order imposes absolutely no requirement that prior to designation as an ETC WW must achieve a 98% level of population coverage. The PSC notes, however, that WW's proposed 85% coverage threshold prior to its designation as an ETC is a threshold that the PSC finds reasonable. The PSC only requires WW to improve upon and achieve 98% coverage within a year of when it satisfies all requirements to be designated an ETC.

As for WW's argument challenging the PSC's 98% coverage requirement, the PSC finds necessary a reminder that the federal goal is to make available to all people of the United States communication services at reasonable charges. This goal is a pre-eminent goal of the Montana Telecommunications Act (*see* §§ 69-3-802 and 69-3-841, MCA). In light of this goal, WW's 85% threshold standard for deciding upon which wire centers it would seek ETC designation is an arbitrarily lower standard that is without foundation other than WW selected it.

In selecting the 98% standard, the PSC is in agreement with MCC that there is confusion over the purpose of ETC designations and the goal of universal service (*TR 315*). The goal of

⁶ WW's asserts to have analyzed its ability to serve 85% of the population.

universal service is fundamentally to serve people that are not served and to continue to serve existing customers, all at affordable rates with quality service. The PSC stopped short of a 100% goal in reflection of the fact that there are impediments to achieving 100%. The presence of dead spots, for example, limits penetration by wireless carriers. The last 2% of the population that WW does not have the obligation to serve provides WW with the flexibility of choosing those customers that it will serve. In addition, 98% is not much above the national average penetration rate for phone service. The 2000 decennial census pegs the penetration rate for phone service at about 97.6%, a value slightly higher than the FCC's estimate of 95.1% for the United States.⁷

As for the WW's motion objecting to the PSC's requirement that WW must by means of its own resources serve all reasonable requests for wireless service at residences and businesses at its own expense the PSC first notes that until WW petitioned the PSC for ETC designation it imposed no requirements that WW serve any customers in Montana.

WW admits elsewhere that it has an obligation to serve "all" customers. In its recent October 15, 2004, comments to the FCC, WW states that "both ILEC and CETC must serve all consumers within designated service areas" (*emphasis added*, *Western Wireless Comments On Reform of the Rural High-Cost Support System, October, 15, 2004, CC Docket No. 96-45, p. 15*). WW explained that it may expand its coverage and enhance service quality by use of a Tellular wireless access unit (*TR 252-253*). Another means by which WW committed to provide service was wireless local loop service (WLLS) (*Order 6492a, p. 5*). The PSC did not require WW to serve "all" consumers, but did require WW to offer services to 98% of each wire center's customer base, and only then within one year after its designation as an ETC. The PSC continues to maintain that WW must achieve this and do so at its own expense.

As for WW's cite to one of Qwest's tariff and the provisions for construction and other special charges, the PSC finds that there are indeed differences in obligations between the CETC and the incumbent ETC. Qwest provides unlimited local residential service for \$16.73/month

⁷ See FCC's October 2004 Telephone Subscribership in the United States at the following URL: http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/subs0704.pdf

before adding other charges (e.g., federal USF, 911, EAS, etc.). If Qwest's line extension tariffs are relevant to this ETC designation proceeding, other of Qwest's tariffs may also be relevant. MCC's proposal in this regard was not embraced in the PSC order. It is noteworthy that the federal USF that Qwest receives, and that WW will also receive upon satisfaction of the public interest requirements in the order, are for the actual lines that Qwest serves.

Finally, as for WW's objection to the PSC's requirement to file coverage maps every 90 days until it achieves 98% coverage, the record is sorely deficient on the quality of service that WW will provide. WW has the burden to buttress assertions and in the absence of evidence supporting its assertions the Commission may impose reporting requirements, one of which is to file maps every 90 days until WW achieves 98% coverage.

Although only mentioned at the onset of its motion and not a point on which it later expands, WW made a faint effort in its motion to dispute the PSC's cream skimming findings. The PSC is unmoved by WW's motion to reverse its initial findings on cream skimming. Although it seems obvious to the PSC that WW is cream skimming, a simple illustration may help.⁸ This is one reason why the PSC sets as a target the ability to achieve 98% customer coverage in each of Qwest's wire centers.

4. Western Argument 4 -- Service Quality Monitoring

a. Argument

WW requests the PSC reconsider and clarify findings in the PSC order. First, WW asks

⁸ WW seeks federal USFs that vary by and that reflect the average cost of all lines in each wire center, including high and low cost loops. The average support level per wire center, including that for higher cost lines, must exceed that for the, assumably, more profitable 85% of the population that WW claims to be able to initially serve. As long as WW serves less than 100% of the wire center's population and assuming it serves the more profitable lines first (85%), then WW receives federal USFs that exaggerate the cost as estimated by the FCC's high-cost model. This is an implicit federal subsidy that derives from WW's cream skimming 85% of the most profitable lines first.

that references to “wire center” be deleted from the filing requirement as the wire center location for complaints monitoring is not relevant to WW’s customer service. WW adds that its “processes” do not provide complaints information by wire center and the wire center is not “an existing data field within the systems for the simple reason that such information is not helpful in improving Western Wireless’ network as a whole, and thus provides no insight into Western Wireless’ quality of service.” WW argues that it simply is unnecessary for WW to provide complaint reports to the Commission on an address-by-address basis.

WW’s also states that the obligation to report unfulfilled requests for service must be clarified and found inconsistent with the customer complaint reporting requirement. WW explains that its systems do not track service requests with respect to Qwest wire centers. WW’s adds that any such requests are based on the customer’s address, which would allow subsequent mapping by wire center if so desired. WW concludes that the Commission should clarify these two requirements and clarify that reporting information by Qwest wire centers is not required.

b. Intervenor Responses

MTA comments that the required service quality monitoring, lifeline, and service packages are straightforward and ensure that WW’s use of funds is proper and consistent with the public interest.

MITS’ response disagrees with WW’s motion because WW’s initial petition identified the Qwest wire centers for which it sought ETC designation and because WW combines publicly available mapping software with its signal coverage to determine the extent to which each Qwest wire center is covered by WW today. MITS notes that Qwest’s service maps are on file with the Commission. MITS adds that WW will receive universal service funds for customers that will likely continue their landline services with Qwest. MITS adds that the Commission’s apparent concern over WW’s ability to provide adequate service quality is reasonable, prudent and defensible.

c. PSC Determination

The PSC order states that the PSC will monitor WW's ability to provide service. The PSC order requires WW to report on requests for wireless service that WW is unable to satisfy regardless of how those requests were communicated to WW (*e.g.*, voice, email, or letter). The order requires these reports to detail WW's inability to serve customers by the customer location in each wire center. The reports were to provide a detailed description of why customer requests for service could not be satisfied and WW was to file such reports on a quarterly basis for as long as WW is designated an ETC.

The PSC order also requires WW to document and report the number of customer complaints that it receives. In each wire center for which WW was designated an ETC, WW must record the complaints that it receives from customers, identify the nature of the complaint (*e.g.*, poor transmission, dropped calls, busy signals) and explain the remedy employed to address each complaint. Based upon these records it must be possible to map the complaints to addresses within each wire center. A record of repeat complaints was to be maintained. The order required WW to file with the Commission on a quarterly basis the complaint records. The complaints-reporting requirement pertains only to WW's provision of service at the addresses of both residential and business subscribers in those Qwest exchanges for which WW is designated an ETC.

First, for purposes of providing reports on customer complaints WW admits that it has the addresses of customers. Second, and as a matter of logic, WW must know which wire center each customer is in otherwise it cannot submit to USAC (Universal Service Administrative Company) a legitimate request for federal universal service support. All the Commission has done is marry these two facts. WW must either submit reports on complaints by address by wire center or it must forego designation as an ETC.

Similarly, and with respect to unfilled requests for service, if a customer requests and receives service in a Qwest wire center for which WW is designated an ETC, the customer count

will ratchet up a notch. WW must know each wire center for which a customer receives service or there is no integrity to the process established by the FCC to establish wire center specific costs and support mechanisms for carriers based upon the number of customers served in each wire center. Thus, the ability to identify a wire center for which WW is unable to provide service, given it must identify wire centers for which it can provide service, are logically related requirements. Again, WW can ignore this requirement as long as it does not wish to be designated an ETC. The Commission finds the obligation absolute and will impose the same on every other ETC designated to serve in non-rural carrier wire centers.

As for the relevance of the Commission's requirement, it was WW who in the first instance sought to be designated an ETC in wire centers for which it can serve at least 85% of the population. If WW's motion has any logical foundation, then the basis upon which WW's application was filed is erroneous. WW cannot have it both ways. It cannot petition in the first instance to be an ETC based upon its ability to serve 85% of a wire centers population and turn right around and claim it has no information on its ability to provide service. The two WW positions are at war with themselves.

5. Western Argument 5 -- Reporting Federal Universal Service Support

a. Argument

WW requests the PSC reconsider and modify the requirement that it report for each wire center on a quarterly basis the federal universal service support that it receives. WW's motion adds that because this requirement was not imposed on any other ETC that it is patently discriminatory. WW questions the need for such information. WW maintains that, in any case, it cannot report such data by wire center as USAC does not provide information to WW that provides such detailed information and therefore WW has no ability to allocate the support it receives among the Qwest wire centers. WW maintains that USAC's funding mechanism prevents WW from reporting universal service funds on a wire center basis.

b. Intervenor Responses

MITs argues that the requirement is not overly burdensome and it is reasonable to track ETC funding. There must be a correlation between the access lines it reports to USAC and the per-line funding it receives which is wire center based.

c. PSC Determination

The PSC order required WW to report the federal USFs including the Lifeline and Link Up credits that it receives. The reports were to be filed quarterly for each wire center in which WW is designated an ETC.

If, as WW holds, wire center level detailed information is not available from USAC, then the Commission requires WW to copy the Commission with every filing it makes to USAC for federal USF support in the specific wire centers for which it is designated an ETC. That resolution should resolve the inability USAC has to provide WW data.

If however the above resolution is one that WW also opposes, then the Commission is obliged to withdraw its intent to designate WW an ETC for Qwest's wire centers. The Commission must reverse its prior decision as the only way that WW can receive federal USFs, in the case of service in a service area of a non-rural carrier such as Qwest, is if WW reports to USAC the number of subscribers it serves by wire center. This is so because the FCC's high cost model funding varies by wire center. Thus, if in the first instance WW has no knowledge of whether its customers are in one or another of Qwest's wire centers, the Commission has no guarantee that WW is submitting claims for the actual number of customers it has in each of Qwest's wire centers. This requirement is absolute and until WW produces the requested information, the Commission will not certify WW as an ETC.

As for WW's assertion that the requirement is patently discriminatory the Commission disagrees. This requirement will be placed on each and every designated ETC in Montana that seeks designation for service areas of non-rural carriers. Thus, before Qwest is certified again as

an ETC, it too will have to provide this information as will any other ETC designated to serve in Qwest's service area.

6. Western Argument 6 -- Filing of Rate Plans

a. Argument

WW agrees to file information that identifies its rate plans and standard customer service agreement. WW, however, expressly reserves (citing 47 U.S.C. §332(c)(3)) its legal right to challenge any action of the PSC that amounts to unlawful regulation of such a filing.

b. Intervenor Responses

MITC responds that it is unlikely the PSC has adequate authority to deny WW its legal right to challenge PSC actions. WW's request to include in the order on its motions language that suggests the order is reviewable upon appeal should be summarily dismissed.

c. PSC Determination

The PSC order required WW for as long as WW is designated an ETC to have on file with the PSC a copy of each rate plan that it offers for which it may receive federal universal service support. Each plan must include the rates, terms and conditions of service. The PSC shall establish in rules any necessary rate caps and terms for unlimited service (minutes of use). WW will have to comply with those and other rules, once the rules are adopted.

WW appears confused over the relevance of § 332(c)(3). This Commission would not impose any requirements on WW, but for WW's petition to receive federal USFs. WW was free to enter the wireless market in Montana just as it is to exit the market and without any PSC approval so long as WW is not also designated the ILEC. However, the PSC is compelled by both § 214 and § 69-3-840, MCA, to ensure that WW's designation is in the public interest. When WW's petition to be designated an ETC is granted, concomitant obligations emerge that involve whether the designation is in the public interest. WW has no option but to file its rate

plans as required by this Commission for as long as it is a recipient of federal USFs. If WW ceases to have on file with the Commission all rates, terms and conditions, then WW will not be certified an ETC by the Commission.

7. Western Argument 7 -- Lifeline Requirement Condition

a. Argument

WW asks the PSC to reconsider and eliminate the requirement that it file as a prerequisite to obtaining “a Lifeline assistance for qualifying low-income consumers” a certification with USAC regarding its compliance with the FCC’s Lifeline rules. WW adds that such a request is contrary to FCC Rule 54.401(d), in that the USAC does not provide any such certification as a prerequisite to providing Lifeline support. WW also adds that on a quarterly basis it certifies to USAC its compliance with 54.401(d), but USAC does not respond by certifying WW’s compliance.

b. Intervenor Responses

MITIS comments that the FCC has established requirements for ETCs in regard to Lifeline assistance adding that all ETCs should comply with applicable state and federal rules and programs.

c. PSC Determination

The PSC order required WW to file with the USAC its demonstration that its Lifeline plan complies with the FCC’s rules. Once the USAC certifies that WW’s plan is compliant with the FCC’s rules Lifeline assistance will be available to qualifying low-income consumers served by WW.

Although the cited FCC rule states explicitly that USAC must certify an ETC’s compliance the PSC has, through informal communications with USAC, verified that, in fact, the USAC does not certify ETC compliance plans as explicitly required by the rule. Thus, when WW

has complied with the requirements of this order, this Commission will inform USAC of WW's compliance.

C. MCC Motion for Reconsideration

a. Argument

MCC agrees the PSC has authority to place conditions on any grant of ETC status. MCC urges the PSC to condition the grant of ETC status on compliance with FCC rule 47 C.F.R. §54.307(a). The rule provides that a CETC shall receive USFs to the extent that the CETC captures subscriber lines of an ILEC or serves new subscribers in the ILEC's service area. MCC recites the Commission's express concern over the size of the federal USF and restates the Commission's finding (Order 6492a, p.17) that deferred to the FCC the resolution of the issue.

These concerns are, however, being addressed at the Federal level by both the FCC and the Federal-State Joint Board. For that reason, the Commission also finds the MCC's testimony on how to interpret what "new" and "former" subscribers are (FCC Rules, Section 54.307) is an issue that is more appropriately resolved by the FCC. The FCC's recent NPRM (CC 96-45, Released June 8, 2004) has as one issue the concern raised here by the MCC. Therefore, it appears to the Commission unnecessary to address how to interpret the FCC's rules on new and captured customers in this docket. (Order 6492a, p.27, footnote excluded)

MCC requests the PSC to reconsider the above finding with respect to the "new and captured lines issue." MCC argues the PSC's failure to condition Western's designation as a CETC on limiting USFs based on new and captured lines violates the rule, provides a "windfall" to Western at the expense of consumers, does not relate to the universal service principles of 47 U.S.C. §254(b), and is a "serious mischaracterization" of FCC action on this issue.

MCC also asserts that the PSC's failure to limit support to new and captured lines violates the federal law as previously argued in the MCC's briefs:

The limitation of support to captured and growth lines is a positive requirement of the FCC's regulations, and is the only reading of 47 C.F.R. §54.307(a) that makes any sense as a matter of statutory construction and in the context of the goals of universal service. It is also the only reading

that is consistent with the concept of portability of universal service. If the Commission approves Western Wireless' application, it should do so in accordance with federal law, including 47 C.F.R. §54.307(a), by requiring that the company only report and receive support for captured and growth lines. MCC Response Brief at p.9

MCC holds that the meaning of captured and growth lines was explained in its opening brief and this meaning is clear and is contrary to the PSC's findings in PSC Order No. 6492a and therefore needs no "interpretation." MCC adds that the FCC, despite its concern about the growth in the USF is not apparently enforcing its own regulations, thereby compounding the growth in the fund about which it has concern. MCC asserts that the failure of the FCC to enforce its own rules does not give the PSC license to issue an order that violates federal law. MCC urges the PSC to condition its order on the existing rule as this would alleviate the growth in the USF by preserving the ability of carriers to operate, maintain and expand networks that serve the universal service set forth in § 254(b). The failure to limit Western's draw on the federal USF to captured and growth lines results in a "windfall" that is an expense to customers for service that Western already provides. The federal USF should not be burdened with subsidies for the 90,000 or so lines that WW serves when there is no corresponding public universal service benefit. In addition, the PSC's finding rests on a mischaracterization of the FCC's Notice of Proposed Rulemaking (NPRM) as the "concept of limiting funding, as the law already provides, to captured and new lines, does not appear in the FCC's notice." Thus, the NPRM is a false premise upon which the Commission finds it unnecessary to address the issue.

b. Intervenor Responses

MTA supports the MCC's request to reconsider insofar as the PSC order fails to require that Western report and receive support only for captured and new growth lines. MTA asserts that there is significant record evidence in support of the view that USF support be limited to new and captured lines. The PSC's decision therefore ignores several facts: 1) neither the FCC nor the Federal-State Joint Board has actually committed to address this concern and the FCC's inquiry

focuses instead on the “primary line” issue; 2) the Commission should not permit Western to exploit the FCC’s lack of enforcement, as doing so would violate the PSC’s own public interest mandate; and 3) as Western clearly intends to report all of its lines, the PSC should require otherwise or Western will receive a “windfall.”

c. PSC Determination

MCC is correct that the FCC NPRM did not explicitly ask for comments on captured and new lines. This argument misses the point, however, as the FCC’s NPRM attaches the Federal-State Joint Board’s (FSJB) February 27, 2004, Recommended Decision.⁹ The FCC’s NPRM seeks comments on the scope of support issue contained in the FSJB’s recommended decision, which explicitly discusses at numerous points the issue of captured lines. Therefore, there was an opportunity to comment on the issue raised by the MCC as indicated in the PSC order.

The PSC also determines the FCC rule does not have an affirmed meaning. The phrase “...serves new subscriber lines...” has not been interpreted, and could mean lines to anyone anywhere or to lines only at residence and business locations. Wireless being a condition of joint products also has not been considered in application of the rule. Wireless produces joint products as consumers can use them to substitute for wire line services, which appears not to be the normal purpose, or consumers can use them for what wireless is uniquely designed to do which is to provide mobility amenities, which is a complement to, or an entirely different product than, local basic exchange service.

To the extent that mobility is the main purpose and use for the consumer, then an implicit interpretation of the FCC rule and FCC action has been apparently to fund every conceivable wireless with federal USFs. This interpretation points to the enormity of the FCC’s leadership

⁹ In its February 27, 2004 Recommended Decision (RD) to the FCC a majority of the members to the Federal State Joint Board on Universal Service (FSJB) favored a primary line restriction. The FCC sought comment on the FSJB’s RD and the Montana PSC comments were in opposition to the primary line restriction in favor of basing support upon a carrier’s own costs.

failing. This is why the PSC must leave resolution to the FCC. Just how this problem is to be resolved is a policy issue before the FCC and upon which the FCC will issue new rules. The PSC has, in response to the FCC's invitation for comments, responded in favor of limiting the scope of universal service funding, primarily by means of basing ETC support upon the ETC's own costs.¹⁰

PSC ORDER

The PSC grants reconsideration to Western and MCC for the purposes of further consideration. Upon further consideration the PSC denies the motion of Western and the motion of MCC and affirms PSC Order No. 6492a in accordance with the above discussions and clarifications.

Done and dated this 21st day of December, 2004, by a vote of 4-0.

¹⁰ See Montana Commission's September 22, 2004 Comments. In initial comments, OPASTCO, RICA and RTG Inc. proposed a tiered series of safe harbor ratios for determining a wireless CETC's per-line support as an alternative to a primary line restriction. The Commission agreed that OPASTCO's proposal is an alternative to a primary line restriction, although basing support on a carrier's own cost is a better solution. If a CETC disagrees with the percentage of the ILEC's federal support (e.g., 20 percent with Tier II), the CETC, under the OPASTCO proposal, may always submit its own costs.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

THOMAS J. SCHNEIDER, Vice-Chairman

MATT BRAINARD, Commissioner

GREG JERGESON, Commissioner

JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)